UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL BRANDAO, Plaintiff,	:	
v.	:	C.A. No. 16-379M
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Before the Court is Plaintiff Michael Brandao's motion for reversal of the decision of the Commissioner of Social Security (the "Commissioner"), denying Supplemental Security Income ("SSI") under § 1631(c)(3) of the Social Security Act, 42 U.S.C. § 1383(c)(3) (the "Act"). Plaintiff argues that the Administrative Law Judge ("ALJ") erred in failing to call a medical expert to testify regarding whether Plaintiff's severe right ankle impairment met or equaled Listing 1.03 (20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.03), which covers reconstructive surgery or surgical arthrodesis of a major weight bearing joint with the inability to ambulate effectively for at least twelve months. Plaintiff also alleges that the ALJ failed to follow the proper standard in finding that "[Plaintiff's] statements concerning the intensity, persistence and limiting effects of [his] symptoms are not entirely credible." Tr. 22. Defendant Nancy A. Berryhill asks the Court to affirm the Commissioner's decision.

The matter has been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Having reviewed the entire record, I find that the ALJ's findings are well supported by substantial evidence, that there was no error in failing to procure a medical expert to opine further regarding Listing 1.03, and that the ALJ's thorough

and detailed analysis of the credibility of Plaintiff's claims about the intensity, persistence and limiting effects of his symptoms is consistent with applicable law. Accordingly, I recommend that Plaintiff's Motion to Reverse the Decision of the Commissioner (ECF No. 10) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 13) be GRANTED.

I. Background

A "younger" person in Social Security parlance, Plaintiff was thirty-six on his original alleged onset-of-disability date in December 2009 when he injured his ankle due to being "assaulted while intoxicated." Tr. 77, 65. Plaintiff had completed high school and, for much of the ten years before he hurt his ankle, operated his own towing/snow plow business with reported earnings as high as $40,000 in 2003. Tr. 172, 236. This business involved both physical work, as well as bookkeeping and the other functions essential to the running of a small business; the business ceased operations in 2007 or 2008 due to financial difficulties. Tr. 236-38, 357. After his business was shut down, Plaintiff worked for a landscaper until he injured his ankle. Tr. 236. The ankle injury required reconstructive surgery in January 2010. Tr. 65. During recovery from ankle surgery, Plaintiff gained 100 pounds; for the period of alleged disability, Plaintiff weighed well over 400 pounds, at times over 450 pounds. Tr. 255, 284, 357. The ALJ treated obesity as a severe impairment and considered its effects in determining whether Plaintiff's right ankle met or equaled any Listing. Tr. 21.

This is not Plaintiff's first disability application. On December 1, 2011, he applied for SSI with the same alleged onset date; this prior application proceeded through the administrative phase to an ALJ hearing and adverse (to Plaintiff) decision, a copy of which is in the record. Tr. 59. In this first proceeding, the ALJ considered Plaintiff's right ankle impairment during the

twelve-month period following reconstructive ankle surgery and beyond; she found that, while the ankle amounted to a "severe" impairment, the evidence established that Plaintiff "was able to ambulate" and use his extremities effectively. Tr. 63. That finding, coupled with the absence of any source opining that Plaintiff's right ankle met or equaled a Listing, resulted in the determination that Plaintiff's ankle did not meet any Listing, "with particular attention to Listings 1.00."[1] Id. For example, the ALJ's decision notes entries in the treating record such as, "on October 17, 2012 that the claimant was in no apparent distress with a steady/independent gait, an ability to move all extremities, and a within normal neurological exam." Tr. 66. The prior decision's adverse credibility finding is based on an array of evidence, including Plaintiff's refusal of, or noncompliance with, almost all recommended treatment for his ankle, except for narcotic medications, which he "possibly" abused, as well as the refusal of a treating source to renew Plaintiff's handicapped parking pass because he did not meet the criteria. Tr. 69. Based on these findings, on May 2, 2013, the ALJ issued the prior decision holding that Plaintiff had not been disabled. Tr. 72.

No appeal was taken from the ALJ's adverse decision on the 2011 application. Instead, on June 25, 2013, Plaintiff filed the new application, which is under consideration now. At the second ALJ hearing, through counsel, Plaintiff amended the alleged onset date to June 25, 2013. Tr. 17, 38. In so doing, Plaintiff acknowledged the preclusive effect of the prior decision. He asked the ALJ to focus on the subsequent period, arguing that, "certainly since 2013," the

[1] The Listing put in issue by this appeal (Listing 1.03) is within the family of the 1.00 Listings, which classify impairments of the musculoskeletal system (adults). 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.00.

evidence establishes that the right ankle pain demonstrates that "claimant satisfies listing 13.02[2] [sic], major dysfunction of a joint." Tr. 38.

The ALJ rejected the proposition that Plaintiff's ankle impairment met or equaled any of the Listings pertinent to such an injury. Tr. 20. Her decision includes a detailed survey of the evidence, including the minimal treatment Plaintiff received, Plaintiff's refusal to accept or comply with virtually any recommended treatment except narcotic drugs, Plaintiff's complaints of extreme pain in furtherance of efforts to procure prescriptions for narcotics, and Plaintiff's ability to drive and live alone in an apartment that required him to climb stairs. Tr. 20-29. The ALJ specifically referenced evidence that Plaintiff was "mowing the lawn" and "walking for exercise." Tr. 23.

In the decision, the ALJ afforded "considerable weight" to the critical opinion from Dr. Georgy, who examined the record on April 29, 2014, and cited to various record references reflecting observations of Plaintiff's ability to ambulate. Tr. 97 ("Seen at DO w no gait disturbance . . . Seen 7/7/13 . . . NROM, gait steady . . . 6/19 extremities grossly normal w 0 pain on palpation"); accord Tr. 313 ("He has been walking for exercise."); Tr. 367 ("amculating [sic] with no difficulty"). Based on these record references, Dr. Georgy opined, somewhat confusingly, that Plaintiff could "STAND SIT LIMITED TO 2 HOURS," but also opined that Plaintiff could stand, walk or sit for six hours out of an eight-hour workday, albeit with only occasional use of foot controls. Tr. 97. The ALJ interpreted these seemingly inconsistent entries in the Georgy opinion to correspond to a residual

[2] The Court assumes that this obvious error is either a misstatement by counsel or a typographical error by the transcriber. Based on counsel's further reference to "major dysfunction of a joint," it appears that the argument was focused on Listing 1.02 ("major dysfunction of a joint(s) (due to any cause)"), which broadly circumscribes joint dysfunction and which sweeps in the narrower impairment described in Listing 1.03 ("reconstructive surgery or surgical arthrodesis of a major weight-bearing joint"). It is the narrower Listing (1.03) that is the focus of this appeal. The Court observes that Listing 1.02 appears now to be more apt than Listing 1.03, which seems to focus on the twelve-month period following the reconstructive surgery. Thus, one might conclude that the prior adjudication resolved Plaintiff's inability to meet Listing 1.03 in the twelve months following the surgery, leaving Listing 1.02 as the more appropriate Listing to focus on now. However, the parties have not raised this issue and the Court will not consider it.

functional capacity ("RFC")[3] limited to less than the full range of sedentary work, including sitting for six hours and standing or walking for two hours, of an eight-hour workday, with additional limits in the use of the lower right extremity. Tr. 21, 28.

There is no opinion evidence establishing that Plaintiff could not ambulate effectively for at least twelve months during the period of alleged disability. Notably, Plaintiff submitted opinions from two treating sources, Dr. Howard Perrone and Dr. Jordan DeHaven. Tr. 422, 426. Both opined that Plaintiff could walk (albeit for only one block without rest or pain), does not need to use a cane and does not need to elevate his legs. Tr. 423-24, 427-28.

The only treating source whose notes reflect Plaintiff's persistent complaints of extreme ankle pain is Dr. Thomas Huott, the podiatrist Plaintiff saw throughout the period in issue, until January 2015. However, as the ALJ noted, Plaintiff's complaints caused Dr. Huott to recommend a wide range of treatment, including surgery, aquatic exercise, physical therapy, the wearing of supportive shoes, injections, smoking cessation and weight loss. Tr. 247-59, 289-98, 306-28. Plaintiff declined most of these, occasionally accepting injections, and was largely non-compliant with others, once losing twenty pounds, but refusing to consider swimming or smoking cessation. Tr. 248, 257, 314, 316. Instead, to Dr. Huott's increasing discomfort, Plaintiff pressed for ever more Oxycodone. See, e.g., Tr. 304, 306. Finally, Dr. Huott refused to prescribe more in January 2015 when Plaintiff called twice, first claiming he could not get an appointment with the pain clinic and needed a refill, and then claiming his pills had been stolen while he was at Twin River.[4] Tr. 306. Once Dr. Huott was no longer willing to prescribe Oxycodone, Plaintiff never returned. Id. The ALJ

[3] Residual functional capacity is "the most you can still do despite your limitations," taking into account "[y]our impairment(s), and any related symptoms, such as pain, [that] may cause physical and mental limitations that affect what you can do in a work setting." 20 C.F.R. § 416.945(a)(1).

[4] This record reference to Plaintiff's claim that his Oxycodone pills were stolen from him while he was at Twin River, a well-known Rhode Island casino, raises a different question – how can Plaintiff's testimony in March 2015 that he in "can't get out of bed . . . [is] in bed 90 percent of the day," Tr. 40, be reconciled with his presence at a casino in January 2015?

found that such drug-seeking behavior raises a serious question regarding the credibility of a claimant's complaints of extreme pain, in that they appear to be calculated to procure narcotics, not to procure treatment.

Plaintiff's other principal treating source is the emergency room at Rhode Island Hospital ("RIH"), where he presented with a wide array of complaints, including abdominal pain, elevated blood sugar, back pain, gallstones, skin issues, urinary concerns and sinus complaints. Tr. 263-80, 332-400. On one occasion in September 2013, an RIH staffer noted that Plaintiff had been to the emergency room thirty times in the prior year. Tr. 366. None of these visits resulted in hospitalizations. Nor do any of the notes of these visits record that Plaintiff was unable to walk; to the contrary, the emergency room records include notations such as, "amculating [sic] with no difficulty" and "extremity: negative for decreased range of motion . . . Gait: is steady." Tr. 367, 374.

II. Issues Presented

Plaintiff's motion for reversal rests on the arguments that the ALJ erred in failing to obtain medical expert testimony to address whether Plaintiff's right ankle impairment satisfied Listing 1.03 and that the ALJ failed to follow the proper standards for evaluating Plaintiff's credibility.

III. Standard of Review

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – that is, the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by

substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; see also Frustaglia v. Sec'y of Health & Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied). Thus, the Court's role in reviewing the Commissioner's decision is limited. Brown, 71 F. Supp. 2d at 30. The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 153 (1st Cir. 1989)). "[T]he resolution of conflicts in the evidence is for the Commissioner, not the courts." Id. at 31 (citing Richardson v. Perales, 402 U.S. 389, 399 (1971)). A claimant's complaints alone cannot provide a basis for entitlement when they are not supported by medical evidence. See Avery v. Sec'y of Health & Human Servs., 797 F.2d 19, 20-21 (1st Cir. 1986); 20 C.F.R. § 416.929(a).

IV. Disability Determination

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 416(I); 20 C.F.R. § 416.905. The impairment must be severe, making the claimant unable to do previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 416.905-911.

A. Five-Step Analytical Framework

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 416.920. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. § 416.920(b). Second, if a claimant does not have any impairment or combination of impairments that significantly limit physical or mental ability to do basic work activities, then the claimant does not have a severe impairment and is not disabled. 20 C.F.R. § 416.920(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Appendix 1, the claimant is disabled. 20 C.F.R. § 416.920(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. 20 C.F.R. § 416.920(e)-(f). Fifth, if a claimant's impairments (considering RFC, age, education and past work) prevent doing other work that exists in the local or national economy, a finding of disabled is warranted. 20 C.F.R. § 416.920(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five step process applies to both DIB and SSI claims). That is, once the ALJ finds that a claimant cannot return to the prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the local or national economy. Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001). To meet this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989).

B. Developing the Record

Social Security proceedings are "inquisitorial rather than adversarial." Sims v. Apfel, 530 U.S. 103, 110-11 (2000); Miranda v. Sec'y of Health, Educ. & Welfare, 514 F.2d 996, 998 (1st Cir. 1975) (social security proceedings "are not strictly adversarial."). The ALJ and the

Appeals Council each have the duty to investigate the facts and develop the arguments both for and against granting benefits. Sims, 530 U.S. at 110-11. The obligation to fully and fairly develop the record exists if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Evangelista, 826 F.2d at 142. Courts in this Circuit have made few bones about the responsibility that the Commissioner bears for adequate development of the record. Id.; see Deblois v. Sec'y of Health & Human Servs., 686 F.2d 76, 80-81 (1st Cir. 1982); Currier v. Sec'y of Health, Educ. & Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Evaluation of Subjective Symptoms

When an ALJ decides not to credit a claimant's testimony, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. See Da Rosa v. Sec'y of Health & Human Servs., 803 F.2d 24, 26 (1st Cir. 1986); Rohrberg, 26 F. Supp. 2d at 309-10. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence. See Frustaglia, 829 F.2d at 195. The lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence so that the credibility determination is determinative, "the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

Guidance for how to evaluate the claimant's statements regarding the intensity, persistence, and limiting effects of subjective symptoms for this case is provided by the Commissioner's now-superseded 1996 ruling, SSR 96-7p, 1996 WL 374186 (July 2, 1996). This ruling was superseded by SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016), which became

effective on March 16, 2016, well after the ALJ addressed the issues in this case. Pursuant to SSR 96-7p, credibility of an individual's statements about pain or other symptoms and their functional effects is the degree to which the statement can be believed and accepted as true; in making this determination, the ALJ must consider the entire case record and may find that all, only some, or none of an individual's allegations are credible. Id. at *4. One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the record. Id. at *5-6. And when allegations of functional limitations based on pain are in issue, in this Circuit, the adjudicator must consider facts pertaining to the factors listed in Avery, 797 F.2d at 29.

V. Analysis

A. Medical Expert Testimony

Plaintiff's principal attack on the ALJ's decision is that she erred in failing to obtain medical expert testimony to address the Step Three issue whether Plaintiff's right ankle impairment satisfied Section 1.03 of the Listing of Impairments.[5] Plaintiff argues that the Court must remand the matter because the Georgy opinion should be ignored and, without it, the

[5] Listing 1.03 is captioned "Reconstructive Surgery or Surgical Arthrodesis of a Major Weight-Bearing Joint." Included in the family of 1.00 Listings, this Listing is met when an individual is impaired by "inability to ambulate effectively, as defined in Listing 1.00B2b, and return to effective ambulation did not occur, or is not expected to occur, within 12 months of onset." 20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.03. The "inability to ambulate effectively" is defined in Listing 1.00B(2)(b)(2), as the inability to "sustain[] a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living." Id. Listing 1.00B(2)(b)(2). More specifically, the ability to "ambulate effectively" means:

> They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surface, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistance devices does not, in and of itself, constitute effective ambulation.

20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.00B(2)(b)(2).

Listing finding is based on the ALJ's lay interpretation of the medical evidence. He asks the Court to focus on the cases holding that an ALJ's findings are not conclusive if they are "derived by . . . judging matters entrusted to experts." E.g., Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999). Plaintiff contends that an expert called to opine on Listing 1.03 could reweigh the evidence in light of his own testimony that he must use a cane and elevate his leg and that he spends almost all of his time in bed, as well as in light of the references to pain in Dr. Huott's treating notes.

Plaintiff's opening assault is premised on the proposition that the ALJ did not rely on Dr. Georgy at Step Three. Rather, he contends, the ALJ's Step Three finding is based on little more than "a review of the physical Listing of Impairments, giving particular attention to those containing an evaluation of the impairments alleged by the claimant." Tr. 20. The argument is not without foundation – Plaintiff is right that the ALJ's discussion of this finding is a bit skimpy. However, this argument overlooks the ALJ's incorporation by reference of the far more robust analysis of the evidence that is found later in the opinion. Tr. 20 (referring to "greater detail at Finding 5"). And, in Finding 5, the ALJ expressly afforded great weight to the opinion of Dr. Georgy, which includes the conclusion that Plaintiff was "not disabled." Tr. 101. This conclusion, in turn, is necessarily based on consideration of all pertinent Listings,[6] including express consideration of Listing 1.02,[7] Tr. 94, which more broadly covers all joint dysfunctions,

[6] The applicable guidance explicitly states that "[t]he signature of a State agency medical or psychological consultant on [either a DD&T Form or certain other forms] ensures that consideration by [an expert] physician (or psychologist) designated by the Commissioner has been given to the question" of whether a claimant's impairments meet or equal any Listing. SSR 96-6p, 1996 WL 374180, at *3 (July 2, 1996).

[7] Listing 1.02 focuses on joints like the ankle and refers to:

> [A] gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and finding on appropriate medically acceptable imaging of joint space narrowing, bone destruction, or ankylosis to the affected joint(s).

including the more specific impairment referenced in Listing 1.03. Notably, Listing 1.02 appears to be the Listing that Plaintiff's counsel argued was relevant during the ALJ hearing.[8] Tr. 38. Further, in explaining his opinion, Dr. Georgy expressly and accurately referenced several clinical observations in the treating record to Plaintiff's lack of gait disturbance, normal range of motion in the extremities and steady gait. Tr. 97; see, e.g., Tr. 302 (psychiatrist observes that Plaintiff can walk with "[w]addling gait. No abnormal movement noted."); Tr. 367 (Plaintiff observed at emergency room "amculating [sic] with no difficulty"); Tr. 374 (examination at emergency room results in observations that, "extremity: negative for decreased range of motion . . . [g]ait: is steady"). In short, the ALJ did rely on Dr. Georgy in making his Step Three finding and there was no error in such reliance – Dr. Georgy's Listing opinion amounts to substantial evidence because it is properly grounded in the medical record, which he had the expertise to interpret. See Quintana v. Comm'r of Soc. Sec., 110 F. App'x 142, 144 (1st Cir. 2004) (per curiam) (reliance on non-examining consultant appropriate if opinion based on review of record and supported by reference to medical findings).

Plaintiff's other salvos aimed at the Georgy opinion are equally unavailing.

First, Plaintiff contends that Dr. Georgy should not have been afforded "considerable" weight because of the confusing inconsistency in the RFC analysis pertaining to the number of hours Plaintiff could sit, stand and walk. The reader will recall that the ALJ resolved this inconsistency by adopting an RFC with sit limits of six hours and stand/walk limits of two hours per workday. I find no error in the ALJ's resolution of Dr. Georgy's obvious error through the

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20 C.F.R. Pt. 404, Subpt. P, App. 1, Listing 1.02. Listing 1.03 is a subset of the joint impairments covered by Listing 1.02, limited to those that arise from surgery and result in the inability to ambulate effectively for at least twelve months. See n.2, *supra*.

[8] See n.2, *supra*.

adoption of an interpretation that makes sense and is favorable to Plaintiff. See Hebert v. Colvin, No. 3:15-CV-30198-KAR, 2017 WL 1042070, at *9 (D. Mass. Mar. 17, 2017) ("The ALJ's incorporation of greater restrictions than the state agency physicians found into his RFC was not error."). In any event, if this were error, the mistake affects the ALJ's RFC finding, but does not affect Dr. Georgy's opinion that Plaintiff's ankle impairment did not meet or equal any Listing. Plaintiff's second attack is based on Dr. Georgy's failure to mention Listing 1.03 in either of the Disability Determination Explanations. Tr. 77, 89. This argument may be given short shrift. Such an omission is beside the point: there is an express reference to the broader listing (1.02), which incorporates all joint dysfunction. Moreover, Listing 1.02 is also the Listing that was named by Plaintiff's attorney during the ALJ hearing. Plaintiff's third argument is based on what he contends is material new evidence that Dr. Georgy did not see. In support of this critique, Plaintiff contends that the viability of the Georgy opinion is undermined by references late in the medical record to "left ankle osteoarthritis." However, complaints of pain in the left ankle are not "new" – Dr. Huott's treating notes mention Plaintiff's complaints about his left ankle both before and after Dr. Georgy's file review. Tr. 291, 293, 310, 327.

To summarize, I find that the ALJ did rely on a medical expert to conclude that Plaintiff's ankle impairment did not meet or equal any of the 1.00 Listings, which include Listing 1.03 – he afforded considerable weight to the opinion of Dr. Georgy, who examined the record, considered the evidence, including a specific look at the clinical findings regarding Plaintiff's ability to ambulate, and found that no relevant Listing (including Listing 1.02) was met or equaled. None of Plaintiff's reasons for urging the Court to ignore the Georgy opinion holds water.

Before closing, I turn briefly to the specific evidence that Plaintiff contends supports his argument that another medical expert reweighing the facts might conclude that Listing 1.03 is

equaled or met. This argument stumbles on careful examination of the record. For starters, both of the treating source opinions in the record – Dr. Perrone and Dr. DeHaven – opined that neither the cane nor leg elevation was necessary. Tr. 422, 426. Similarly, Plaintiff's testimony that he spends almost all of his time in bed is contradicted, for example, by his drug-seeking call to Dr. Huott in which he claimed that his Oxycodone pills were stolen while he was at a casino. And Dr. Huott's treating notes are not a reliable source of the impact of Plaintiff's pain; they are largely based on subjective complaints, which the record suggests were exaggerated to procure prescriptions for Oxycodone. This evidence's lack of persuasive force is compounded by Plaintiff's failure to present an opinion from any treating or other source that Plaintiff's ankle met or equaled the criteria of Listing 1.03. See Sullivan v. Zebley, 493 U.S. 521, 531 (1990) (to sustain burden, claimant "must present medical findings equal in severity to *all* the criteria" for pertinent Listing); Torres v. Sec'y of Health & Human Servs., 870 F.2d 742, 745 (1st Cir. 1989) ("it is the claimant's burden to show that he has an impairment or impairments which meets or equals" a Listing).

Based on the foregoing, I find that the ALJ's Step Three finding that Plaintiff's ankle does not meet or equal any Listing is well supported by substantial evidence, including the opinion of a well-qualified expert. Accordingly, there was no need for the ALJ to seek another expert medical opinion. Allen v. Colvin, C.A. No. 13-781L, 2015 WL 906000, at *12 n.10 (D.R.I. Mar. 3, 2015); Pelletier v. Colvin, C.A. No. 13-651 ML, 2015 WL 247711, at *17 (D.R.I. Jan. 20, 2015). I recommend that the ALJ's Listing determination be affirmed.

B. Credibility

Plaintiff contends that the ALJ failed to evaluate properly Plaintiff's subjective complaints as required by SSR 16-3p and Avery, 797 F. 2d 19. The first problem with this

argument is that SSR 16-3p was not effective as of the ALJ's date of decision; rather the operative guidance applicable to this case is SSR 96-7p, to which the ALJ expressly alluded in her decision. Tr. 22. Second, the ALJ did not ignore the Avery factors; to the contrary, she made an exhaustive examination of Plaintiff's statements about his symptoms and pain in the context of the medical evidence, which analysis includes review of facts pertinent to every one of the factors listed in Avery.[9] Tr. 22-26. Accordingly, I find that Plaintiff's argument that the ALJ's analysis was constructed on the wrong analytical foundation is simply wrong. There is no legal error tainting the finding that Plaintiff's statements about his symptoms were "not entirely credible." Tr. 22.

The remaining question is whether the ALJ's credibility finding rests on substantial evidence. To buttress his argument that it does not, Plaintiff contends that the ALJ's extensive and detailed articulation of the reasons supporting the finding collapses because the ALJ relied in part on Plaintiff's resistance to recommended treatment. Specifically, Plaintiff juxtaposes the statements in the decision that "claimant was very resistant to getting injections" and "[i]t was recommended to the claimant [to] diet, and join a gym and swim to lose weight," Tr. 26, with the medical record references showing that Plaintiff did accept injections from time to time, including in both the left and right ankles, and did actually once lose 20 pounds. E.g., Tr. 322, 323, 328.

In considering this argument, the Court must tread softly, because "[i]t is the responsibility of the [Commissioner] to determine issues of credibility and to draw inferences

[9] Avery directs an adjudicator determining the limiting effects of pain to consider: (1) the nature, location, onset duration, frequency, radiation, and intensity of any pain; (2) precipitating and aggravating factors (e.g., movement, activity, environmental conditions; (3) type, dosage, effectiveness, and adverse side effects of any pain medication; (4) treatment, other than medication, for relief of pain; (5) functional restrictions; and (6) claimant's daily activities. 797 F.2d at 29.

from the record evidence." Cruz v. Astrue, C.A. No. 11-638M, 2013 WL 795063, at *16 (D.R.I. Feb. 12, 2013) (citing Irlanda Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991)), adopted, C.A. No. 11-638-M, 2013 WL 802986 (D.R.I. Mar. 4, 2013). The ALJ's credibility determination, which is based upon her observation of Plaintiff, her evaluation of his demeanor, and her consideration of how the testimony fits in with the rest of the evidence, is entitled to deference. Frustaglia, 829 F.2d at 195. Mindful of the need to exercise deference, I find no error in the ALJ's reliance on Plaintiff's resistance to injections or his failure to follow recommendations based on his urgent need to lose weight. The reasons follow.

As to Plaintiff's resistance to injections, the medical record reflects that, while there is no question that he did accept injections, at one point in both ankles, there also are records reflecting that Plaintiff resisted injections, for example during an appointment when he was angling for higher doses of Oxycodone. E.g., Tr. 306 (on December 17, 2014, "one of his friends gave him a 30 mg oxycodone the other day and it resolved all his pain . . . patient refuses injection"). Similarly, with obesity considered by every treating source to be a significant contributing cause of many of his medical issues, Plaintiff's two brief successes with de minimis weight loss[10] does not undermine the appropriateness of the ALJ's reliance on Plaintiff's failure to embrace the many recommendations that he adjust his diet and exercise, as well as that he consider other interventions, including surgery, to address his weight.[11] In any event, the record is rampant

[10] Dr. Huott recommended that Plaintiff lose more than 240 pounds. Tr. 255. At one appointment, Dr. Huott urged him to control his diet and exercise once or twice a day in the pool, which he advised would result in a loss of 70 pounds within eight months. Tr. 257. Plaintiff was also urged to see a nutritionist and consider bariatric surgery. Tr. 358. Other than one reference in October 2014 to Plaintiff "walking for exercise," one reference in May 2013 to a loss of 10 pounds and one reference in June 2014 to a loss of 20 pounds, there is no suggestion that Plaintiff seriously pursued any of these recommendations. Tr. 257, 313, 322; see Tr. 322 (after reported loss of 20 pounds, Dr. Huott "[a]dvised him that this is a good start and encouraged him to continue to loose [sic] weight").

[11] Overall, Plaintiff did not appear to have achieved significant net weight loss. See Tr. 255 (as of March 12, 2013, Plaintiff weighs 440 lbs.); Tr. 367 (as of September 5, 2013, Plaintiff weighs 443 lbs.); Tr. 357 (as of May 12, 2014, Plaintiff weighs 456 lbs.); Tr. 379 (as of February 2, 2015, Plaintiff weighs 425 lbs.).

with other evidence unrelated to weight loss or injections that amply supports the finding of noncompliance with medical advice. For example, Plaintiff's overall resistance to Dr. Huott's recommendations is confirmed in the treating note of Dr. Catherine Chase, who conferred with Dr. Huott about Plaintiff:

> [Dr. Huott] told me that he is increasingly uncomfortable prescribing the amount of opiate analgesic that he is prescribing and that there is evidence that the patient is taking more than is prescribed. In addition, the podiatrist is frustrated that the patient has declined surgery and declined a number of other recommendations that he has made to the patient.

Tr. 304; see also Tr. 295-96, 314 (Plaintiff continues to wear flip-flops, failing to follow recommendation that he wear sneakers); Tr. 302 (Plaintiff resists recommendation that he seek inpatient hospitalization for detoxification from opiates); Tr. 362 ("pt still not interested in exploring [smoking] quitting options"); Tr. 366 ("pt non compliant with follow up appt's"). Particularly pertinent to the credibility analysis is Dr. Chase's assessment of Plaintiff, which includes the notation that, "[c]ertainly the patient is not being totally forthcoming." Tr. 305.

Plaintiff acknowledges that there is no error in the ALJ's reliance on Plaintiff's drug-seeking as conduct that seriously undermines the credibility of his complaints of pain to a physician such as Dr. Huott, from whom he was trying to get increased Oxycodone prescriptions. With the ubiquity of the drug-seeking behavior in this record, even if the Court were to credit Plaintiff's arguments about injections and occasional weight loss, the adverse credibility determination would stand as adequately supported by other substantial evidence. See Beaudet v. Colvin, No. CA 14-112 S, 2015 WL 5510915, at *16–17 (D.R.I. Sept. 16, 2015) (when ALJ's credibility finding is neither "terse nor sparse," it properly rests on other substantial evidence, even after exclusion of erroneous grounds); see also Sanders v. Comm'r of Soc. Sec., 506 F. App'x 74, 76 (2d Cir. 2012) (even if some evidence supports Plaintiff's arguments, if record also

contains substantial evidence supporting the ALJ's conclusion, ALJ should be upheld); Goff v. Barnhart, 421 F.3d 785, 789 (8th Cir. 2005) ("If, after reviewing the record, the court finds it is possible to draw two inconsistent positions from the evidence and one of those positions represents the ALJ's findings, the court must affirm the ALJ's decision.").

I find no error in the ALJ's finding that Plaintiff's credibility is undermined by his resistance to, and non-compliance with, almost all recommended medical treatment other than narcotics. It is amply grounded in substantial evidence. I recommend that the adverse credibility finding be affirmed.

VI. Conclusion

Based on the foregoing analysis, I recommend that Plaintiff's Motion to Reverse the Decision of the Commissioner (ECF No. 10) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 13) be GRANTED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
June 30, 2017